

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BERNARD WHITNEY,
Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, DIVISION OF EMPLOYMENT AFFAIRS, OFFICE OF
ADMINISTRATIVE SOLUTIONS,**
Respondent.

Administrative Law Judge ("ALJ") Keith A. Shandalow held the hearing in this matter on May 18, May 19, June 30, July 1 and July 7, 2016 at the State Personnel Board ("Board"), 1525 Sherman Street, Denver, Colorado. The record was closed on July 7, 2016 after the parties gave their closing arguments. Assistant Attorney General Davin Dahl represented Respondent. Respondent's advisory witness was Bob Trout, HR Manager, Complainant's appointing authority. Complainant appeared and represented himself.

MATTERS APPEALED

Complainant Bernard Whitney ("Complainant") appeals the termination of his employment by Respondent, Colorado Department of Human Services, Division of Employment Affairs, Office of Administrative Solutions ("Respondent" or "CDHS") during his probationary period. Complainant alleges that the termination of his employment was in retaliation for whistleblowing activity in violation of the Colorado State Employee Protection Act ("Whistleblower Act"). Complainant seeks reinstatement to his position as a Human Resources Technician III, as well as back pay and benefits. Respondent argues that Complainant's employment was terminated based on unsatisfactory job performance and was not in retaliation for any purported whistleblowing activity.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUE

Whether Complainant's employment was terminated in retaliation for protected whistleblowing activity in violation of the Whistleblower Act.

FINDINGS OF FACT

General Background

1. Complainant was hired as a Human Resources Technician III ("HR Tech") with the CDHS, Division of Employment Affairs, Office of Administrative Solutions (also known as the "Human Resources" or "HR" office), southern district, located in Pueblo, Colorado, effective December 30, 2013. Complainant's probationary period was to last one year from his date of hire.

2. As an HR Tech, Complainant's job duties included the following, as described in the job announcement to which Complainant responded:

Under general supervision, the individual in this position serves as the primary administrative technical support to CDHS human resource and/or management staff for personnel activity, processes, systems, and forms involving human resource recruitment and selection, employee relations, classification and personnel/payroll information. This is a role where you must interact with customers and build solution oriented business partnerships.

Specific duties for this position include, but are not limited to, the following:

- Process applicant information in an applicant data system (NEOGOV);
- Create and maintain electronic selection files;
- Log and track requested employee life cycle actions i.e., pre employment, request to fill, recruitment, new employee onboarding, training, performance management, progressive discipline, and separations;
- Perform administrative support functions;
- Provides exemplary customer service support to internal and external customers and the Human Resources team to foster a business partner environment;
- Process personnel/payroll actions and maintain data integrity in our HRIS system i.e., Colorado Personnel Payroll System (CPPS) and produce statistical reports from various databases;
- Review employment action requests to ensure completeness and accuracy throughout the processing of these actions;
- Provide guidance to business partner relating to state personnel system's rules, procedures and technical guidelines as it relates to employment support activities;
- Maintain confidentiality of employee, and all sensitive and/or personal information.
- Performs other duties as assigned or required.

3. The CDHS HR office was split into 2 districts -- the northern district, headquartered in Fort Logan, Colorado, and the southern district, headquartered in Pueblo.

4. Nancy Schmelzer was the HR manager for the southern district and Complainant's supervisor from the time Complainant was hired until Bob Troutd was hired in July 2014. After Mr. Troutd's hire, he became the HR manager for the southern district and Complainant's supervisor.

5. At the time of Complainant's hire, the CDHS HR southern district office was divided into two teams, each with a team lead. Andrea Mora, a General Professional ("GP") III, was the team lead for one of the teams. Kathy Ruiz, a GP IV, was the lead for the other team when Complainant was first hired. Subsequently, Justin Icenhower, a GP III, replaced Ms. Ruiz as the other team lead in July 2014. There was a great deal of tension and conflict between the two teams.

6. In addition to the conflict and tension between the two teams, and perhaps adding to it, matters were not handled consistently by the individuals within Respondent's department. Some GP III employees (also referred to as "Generalists" or "business partners") were more rule-driven and committed to strictly adhering to applicable statutes and Board rules, as they understood them. Other business partners took a more practical approach and did not strictly adhere to applicable statutes and rules in order to accomplish recruitment goals. Complainant's team lead was Ms. Mora, who was more rule-driven, and whose example and guidance Complainant generally followed. The other team leads, Ms. Ruiz and, later, Mr. Icenhower, took a more practical and flexible approach to the rules in order to get recruitments done more quickly.

7. Within CDHS' HR office, there existed uncertainty about how certain matters should be handled properly, such as the creation of eligible lists, the manner in which veteran applicants should

be placed on eligibility lists, whether all paperwork and background checks should be completed prior to a new employee's start date, whether "open and continuous" job announcements were allowable, and the like. Both before and after Mr. Troudt became HR manager for the southern district, these issues were not addressed in a definitive way by management, and there were inconsistencies in the manner in which individuals dealt with these issues. This exacerbated the dysfunction and interpersonal tension among CDHS HR employees in the southern district.

Complainant's Job Performance Under Nancy Schmelzer

8. Ms. Schmelzer did not have any problems with Complainant's job performance during the approximately seven months that Complainant reported to her, although she did have a concern that Complainant was taking on too much because of his eagerness to learn too many functions at the same time.

9. On his Performance Management and Pay ("PMAP") evaluation for the period from his hire through March 31, 2014, drafted by Ms. Schmelzer, Complainant received a performance rating of a Level 2, indicating that he was proficient, successful, and occasionally exceeded expectations. In the six core competency areas, he received a 2.5 (the upper end of the Level 2 rating), in Communication, Interpersonal Skills, Customer Service and Critical Thinking/Problem Solving. Complainant received a 1.7 and a 1.5 in Accountability and Job Knowledge, respectively, indicating that he needed to improve in those areas. In the PMAP narrative, Ms. Schmelzer noted Complainant's "significant drive to learn the processes and procedures necessary to complete tasks on a fully-operational level." She also wrote that, "B.J.¹ is a self-starter and is always seeking ways to improve processes and procedures for the office as a whole." In addition, Ms. Schmelzer wrote, "B.J.'s struggles include his tendency to continuously accumulate compensatory time due to working over his 40-hour work week without prior approval from his Work lead. B.J. needs to seek additional assistance or support from his Work Lead on obtaining assistance, when necessary, to adhere to the 40-hour work week." She concluded her narrative by stating: "Overall B.J. is a tremendous asset to the HR Team!"

10. Complainant met with Ms. Schmelzer and Ms. Mora to review his March 2014 PMAP. He was criticized under the Accountability category because he was taking on too much responsibility, he was overloaded and, because he was limited to working no more than 40 hours a week, he missed some deadlines early on. He also clocked out and then clocked back in to complete his work, but Ms. Schmelzer viewed this as a violation of the federal Fair Labor Standards Act and directed Complainant not to do that.

11. Complainant brought several concerns to Ms. Mora. Complainant was confused after his NEOGOV training in March 2014 because the training conflicted with how matters were handled in the CDHS southern district HR department. Some Generalists initiated hires directly from the minimum qualification stage. Some new employees were hired from expired eligible lists. New employee packets, which were supposed to include all required paperwork when a new employee started employment, did not contain all required paperwork. Some Generalists did not follow the rules concerning how veterans who submitted the documentation required to obtain a veteran's preference were placed on eligible lists. Some positions utilized an "open and continuous" job recruitment, which appeared to be in violation of applicable rules and against best practices.

12. Complainant also voiced several of these concerns to Ms. Schmelzer prior to Mr. Troudt's becoming HR director for the southern district. Complainant voiced concerns about how the eligible lists were generated. He also voiced concerns about new hires starting their employment prior to background checks being completed and prior to the completion of their recruitment packets, with

¹ Complainant was most commonly referred to as "B.J." by his co-workers.

such information as results of a urinalysis, name check by the Colorado Bureau of Investigation, and the CHS Trails system, which documents allegations and findings of child abuse.

Conflict with Justin Icenhower

13. For positions for which there were always more openings than candidates, CDHS ran an "open and continuous" recruitment process. Ms. Mora, and then Complainant, believed that this policy violated state personnel rules, and raised this issue several times. The Colorado Department of Personnel and Administration ("DPA"), the ultimate authority concerning how HR matters should be handled within each state agency, did not approve of this policy. Ms. Schmelzer told Ms. Mora that it was legitimate and was the best approach.

14. CDHS maintained an open and continuous recruitment process for nurses at the Colorado Mental Health Institute at Pueblo ("CMHIP"), a state psychiatric hospital in Pueblo and one of CDHS HR's primary customers, because these positions were difficult to fill.

15. Complainant was responsible for reviewing applications for these positions for minimum qualifications. He assisted Justin Icenhower, the Generalist responsible for recruitment for these positions.

16. In Mr. Icenhower's view, the applications for nurse positions needed to be processed every day because of the vacancies and because of competition to hire nurses.

17. Mr. Icenhower felt that Complainant was inconsistent in pushing applications through the process and that Mr. Icenhower would have to remind Complainant to push these applications through.

18. On May 12, 2014, Justin Icenhower, a GP III, sent an email to Complainant reminding him to check the Nurse I and HCT II open continuous recruitments and get them turned around within a day of receipt.

19. Complainant knew from his experience that his contacts at CMHIP not want such applicants referred on such a frequent basis. No evidence was presented that these contacts, Linda Braun and Becky Torres, ever complained about the manner in which Complainant was handling recruitment for these positions at CMHIP.

20. Complainant interpreted the May 12, 2014 email as an attempt by Mr. Icenhower to set Complainant up. Complainant voiced this concern to his team lead, Ms. Mora, who in turn discussed the issue with Ms. Schmelzer.

21. Ms. Schmelzer called a meeting with Complainant and Mr. Icenhower, with Schmelzer acting as a mediator, to discuss the situation. Mr. Icenhower insisted that the email was just meant as a friendly reminder and that he had no issues with Complainant's job performance up to that time.

22. Subsequently, on September 2, 2014, Mr. Icenhower sent an email to Complainant in which he wrote, "Just a quick reach out to see if you need any assistance with the daily Nurse I, HCT I, and HCT II applicant push outs. These position recruitments remain critical and ongoing to the ongoing success of CMHIP and the daily review and notification of/to candidates is crucial to capturing and feeding their interest in CDHS and us not loosing [sic] them to competitors." Immediately after sending the email to Complainant, Mr. Icenhower forwarded a copy of the email to Mr. Troutdt, who was hired as HR manager for the southern district on July 21, 2014.

Bob Troudt is Hired, His Priorities are Communicated, and Complainant Raises His Concerns

23. Bob Troudt was hired as the HR manager for the CDHS HR office for the southern district effective July 21, 2014. He had no prior knowledge of state personnel rules or how CDHS conducted its recruitment and hiring.

24. On August 8, 2014, Mr. Troudt and Complainant had a one-on-one meeting, during which Mr. Troudt gave Complainant, as he did all the employees in the southern district, a list of expectations. Number one on his list of seven was the following: "Please follow up with customers in a timely/effective manner if they ask for something. Keep your creditability [sic] and the HR department's creditability [sic] in mind when giving out information. Please make sure the information is accurate." One of Mr. Troudt's areas of focus for his subordinates was customer service. He had heard that the CDHS HR office had a reputation for not being responsive as well as overpromising and under delivering.

25. In his notes from his meeting with Complainant, Mr. Troudt wrote that Complainant wanted to be a GP III within a year, he was pursuing an M.B.A., and that he needed to see growth potential or he would not stick around.

26. Mr. Troudt did not write in his notes that Complainant raised any concerns about how some individuals were handling recruitments, and testified at hearing that if an issue was not included in his notes it was not discussed

27. At hearing, Mr. Troudt testified that Complainant did raise concerns about how recruitments were being handled.

28. Mr. Troudt also testified at hearing that, after his August 8th meeting with Complainant, he spoke to a couple of business partners about these issues and was told that Complainant did not know what he was talking about, and that there had been director reviews and audits by DPA of HR practices that determined that the HR office was doing nothing wrong.

The Division of Youth Corrections Staffing Ramp-Up

29. In or about September or October 2014, newspaper articles about the Division of Youth Corrections ("DYC") revealed serious problems with the manner in which the DYC facilities were staffed and operated.

30. Consequently, the CDHS HR southern district was tasked with ramping up staffing of correctional, youth, or clinical security officers ("CYSO I"). Vacancies already existed, and approximately 58 or 59 new positions were to be filled.

31. Complainant was assigned as the Tech for this project, assisting GP III Emory Abeyta. Ms. Mora also assisted, as did Peggy Rampa, another HR Technician III.

32. Complainant and Ms. Mora immediately ran into obstacles. First, they needed to know what vacancies existed before filling newly-created positions. However, they discovered that Mr. Abeyta did not communicate the process he was utilizing to recruit for the CYSO I positions and the status of the situation; then he went out on medical leave.

33. According to Complainant and Ms. Rampa, Mr. Abeyta was not creating eligible lists on NEOGOV correctly, and Complainant could not get the appropriate information from NEOGOV. In addition, some eligible lists Mr. Abeyta created had no expiration date, a violation of State Personnel Board rules and the State Personnel Director's Administrative Procedures. Complainant also

discovered that Mr. Abeyta was not creating a veteran's eligible list pursuant to the State Personnel Director's Administrative Procedures..

34. In October and November 2014, Complainant put in many hours dealing with the NYC situation.

35. Complainant created a new-hire Excel spreadsheet for NYC, which was then utilized by both NYC and HR to track staffing rates for the CYSO I, II, and III classifications.

36. Due to his work on NYC, including creating spreadsheets, hiring and covering for Mr. Abeyta while the latter was out on medical leave, Complainant fell behind in his work on other matters in October and November, 2014.

37. Complainant did not adequately communicate to other stakeholders or to Mr. Troutt that he was overloaded and needed assistance if he was to meet all his obligations and deadlines.

NEOGOV Rosters – October and November 2014

38. One of Complainant's responsibilities was to compile and forward the southern district's NEOGOV roster of new employees to Romie Ryden, an HR Data Specialist.

39. Complainant missed the deadlines for the rosters in October and November 2014.

40. On October 6, 2014, Ms. Ryden, HR Data Specialist, sent an email to Complainant requesting that he send the southern district NEOGOV new hire information (SNEO) to her so that she could forward the information to DPA that same day.

41. On October 9, 2014, Ryden sent a second request to Complainant, copying several other employees including Mr. Troutt and Roxane Stuber, CDHS' northern district HR manager, asking Complainant to forward the SNEO roster so that she should get it out by the end of the week.

42. After receiving this email, Mr. Troutt spoke to Complainant and reported back to Ms. Ryden that Complainant would get the SNEO roster out that day.

43. Complainant did get the SNEO roster out that day.

44. Later that day, October 9, 2014, Ms. Stuber sent an email to Mr. Troutt, thanking him for getting involved in this matter and stating that, "This has been a struggle with getting these timely. Romie [Ryden] usually has to remind him or delay sending the report."

45. In November 2014, Complainant was again late sending the SNEO roster to Ms. Ryden.

46. On Thursday, November 6, 2014, Ms. Ryden sent an email to Complainant asking him to get the SNEO roster to her so that she could send it out that afternoon.

47. Ms. Ryden copied Mr. Troutt on her November 6th email to Complainant and Mr. Troutt responded that Complainant was in a NEOGOV training that day.

48. Ms. Ryden responded to Mr. Troutt that day, without copying Complainant, and stated, "If he could get it to me tomorrow that would be great."

49. Mr. Troutt then sent an email to Complainant, instructing "please add this to your to do list for Friday [November 7, 2014]."

50. After 6:00 p.m. on November 7, 2014, Mr. Troudt sent an email to Complainant, stating, "Didn't see a follow up on this. Were you able to get this done today? Thanks."

51. Complainant sent the SNEO roster to Mr. Troudt, copying Ms. Ryden, at 10:46 a.m. on Monday, November 10, 2014.

Complainant's Interim Evaluation in Late October 2014

52. In an interim evaluation/progress review, drafted by Ms. Mora and reviewed by Mr. Troudt in late October 2014, and signed by Complainant on October 30, 2014, Complainant was rated as a Level 2 in each of his core competency areas. The evaluation was complimentary about Complainant and his potential, while pointing out areas in which there was room for him to improve his job performance.

53. With respect to Communication, the narrative states, "B.J. does a great job of seeking clarification from others when tasks and/or messages are unclear. I have received positive feedback from both internal and external staff, as it relates to B.J.'s immediate response to requests from customers. B.J. communicates concerns and issues to the Leads in an effort to mitigate issues that may escalate. B.J. can increase his rating in this area by providing a follow-up response to customers' email request [sic], if/when a verbal response is provided, to ensure all are aware the issue has been resolved."

54. With respect to Interpersonal Skills, the narrative states that "B.J.'s interpersonal communications with internal and external staff is consistently professional in nature. B.J. demonstrates the drive to resolve interpersonal issues and/or concerns among staff immediately. B.J. is especially effective in creating a positive work environment among the Technicians and serves as a resource with all internal staff to respond to questions or develop solutions. B.J. can increase his score in this competency by actively engaging more in team meetings and activities to provide his views on information presented."

55. With respect to Customer Service, the narrative states, "B.J. consistently demonstrates positive, professional customer service with both internal and external customers. Both internal and external customers seek B.J.'s assistance when an immediate response is needed. B.J. has also received excellent comments from stakeholders regarding his responsiveness to requests and these customers find his professional demeanor invaluable. If B.J. is unable to assist a customer, he seeks assistance and/or guidance to ensure a response is provided both timely and efficiently."

56. With respect to Accountability, the narrative states, "B.J. holds high regard for learning all aspects of his job and providing excellence in the quality of his work. B.J. always seeks ways to streamline processes and procedures. B.J. never turns down a project or assignment and readily assists both external and internal staff when necessary. B.J. can increase his rating in this competency by continuing to seek assistance when his plate is full to ensure timely response to requests for information (NEO lists, UI Claims, etc.)."

57. With respect to Job Knowledge, the narrative states, "B.J. continuously strives to increase his job knowledge by requesting training in all areas of recruitment, selection, database creation/management (Excel, CPPS, etc.), and training (NEO-Policies). B.J. has the drive to provide seamless support to all HR Specialists to learn the respective agencies within CDHS. When given a project, B.J. immediately analyzes the request in an effort to determine ways to provide the most accurate, up-to-date information (i.e. [sic] DYC reports). B.J. is eager to learn how to create graphs and charts to provide a clearer picture of the information being presented to HR Management staff."

58. With respect to Critical Thinking/Problem Solving, the narrative states, "B.J. consistently demonstrates drive and initiative to improve processes and procedures across all areas of H.R. B.J. enjoys challenges and provides samples (i.e. [sic] via spreadsheets or through verbal communication) when a problem or concern surfaces from a customer. B.J. is not afraid to think 'outside the box' and can increase his rating in this area by continuing to engage more in group discussions and projects."

59. A meeting was held on October 30, 2014 to review Complainant's interim evaluation with him. Mr. Troudt and Ms. Mora were present, along with Complainant. Mr. Troudt's notes from the meeting refer to Complainant's development of a new hire excel spreadsheet for DYC that was being used by both DYC and HR to track staffing for CYSO positions. Under the category of "Major Challenges," Mr. Troudt wrote, "Fitting workload into an 8-hour schedule. B.J. will work with Emory [Abeyta], the other Technicians, and Andrea to seek assistance when necessary."

NEOGOV MEETING WITH JOEL FERGUSON ON NOVEMBER 6, 2014

60. A NEOGOV meeting with employment consultant Joel Ferguson of the Department of Personnel and Administration was scheduled in Denver for November 6, 2014.

61. Prior to the meeting, Ms. Mora met with her team, including Complainant, and urged them to ask questions about issues that were unresolved, such as the proper way to create eligibility lists, the handling of veteran applications, paperwork and background checks necessary prior to hiring.

62. During the meeting, Complainant asked questions about the proper way to do things related to the recruitment process, and made comments that indicated that some individuals in the southern district were not following the rules or best practices.

63. Mr. Ferguson was surprised that some individuals in the southern district were doing things contrary to the rules and best practices, and stated that he might have to come down to Pueblo to provide further training.

64. When Complainant was asking questions and indicating that matters were not being consistently handled correctly in the southern district, Mr. Troudt turned around and looked back at Complainant, and appeared annoyed or frustrated or as if he was wondering why Complainant was asking those questions. Mr. Troudt testified at trial to the contrary, but Complainant's testimony on this issue was corroborated by several other witnesses, including Andrea Mora, Bennie Jackson and Peggy Rampa. Mr. Troudt's testimony on this issue lacks credibility.

65. After the meeting ended, Mr. Troudt spoke with Mr. Ferguson and asked that the latter come down to Pueblo to meet with staff to ensure they were doing things correctly.

66. On November 7, 2014, Mr. Troudt sent an email to Joel Ferguson thanking him for his class on November 6th and asking him when it would be convenient for him to come down to Pueblo to discuss some of the issues discussed at the previous day's training.

67. Mr. Ferguson did not go down to Pueblo because he transitioned to the Department of Revenue in early December 2014.

68. After the meeting, Mr. Troudt expressed his concerns about his employees consulting with DPA too often and the impression it might create that his employees did not know what they should know about how to do their jobs correctly.

EVENTS OF NOVEMBER 2014 AFFECT MR. TROUDT'S PERCEPTION OF COMPLAINANT

69. As of November 6, 2014, Mr. Troudt had not made up his mind about Complainant and whether he would continue his employment when his probationary period expired in late December.

70. At that time, Mr. Troudt did have concerns about what he perceived to be Complainant's inconsistent performance and his perception that Complainant needed to be reminded of his responsibilities and deadlines.

71. As noted above, Complainant did not complete and forward November's monthly SNEO roster until November 10, 2014.

72. On November 14, 2014, Complainant was late for a DYC weekly meeting.

73. On or about November 19, 2014, Mr. Troudt became aware of missed deadlines concerning an unemployment insurance claim. Although it was ultimately unclear who, if anyone, at the southern district HR office was responsible for any mistakes made, Justin Icenhower wrote in an email to Mr. Troudt that, "Quite honestly this looks like something that BJ did not pursue as the coordinator at the time." On or about December 9, 2014, Mr. Troudt discovered that Complainant was not at fault with respect to this issue.

Processes Project

74. In the Fall of 2014, the HR department commenced a project to document processes within the recruiting function of the DHS HR department and to establish consistent processes.

75. As part of that project, teams were created to address specific issues. One of the teams was tasked with addressing the pre-recruiting and recruiting process. Daryn Ridenour, who was then a GP III, was in charge of this team, which included Mr. Ridenour, Complainant, and Cassie Brandt. As part of this team, Complainant was responsible for attending weekly meetings and to create a process document, a flow chart of the pre-recruitment and recruitment process.

76. In an email dated Wednesday November 19, 2014 from Mr. Icenhower to Complainant, Mr. Icenhower wrote, in pertinent part, "Please ensure that the flow chart for Job Analysis/Intent to Fill assignment is ready to go for Friday's meeting....This team is very much on Nyle's [Nyle Boyd, CDHS' Director of Employment Affairs] radar and she is actively tracking its progress and success."

77. Less than an hour later, Daryn Ridenour responded and complained:

Quite frankly at this point I have no faith that this is going to get done by B.J. so I intend to do it myself and I believe Andrea said yesterday that he is going to be out on vacation the rest of the week starting today. I have sent B.J. numerous emails and left messages and he has not responded, not sure why, but the fact he doesn't even bother responding is frustrating and as busy as we are I do not have the time to track him down. I know we are all busy, but it has become apparent that he does not care, has no accountability for his lack of participation and he chooses to avoid the issue by not responding and I have not heard of any phone issues or email outages in Pueblo that would prohibit him from responding.

Andrea spoke to him last week after I reached out to her since I could not get in touch with him, she said she spoke to him and he would be in contact with me. He never contacted me so on Friday when we have our regularly scheduled call, Kasi and I called him and I emailed him but could not get in touch with him, he responded later

that morning via email saying he was available later in the day to speak. I responded to him letting him know I was not available but to provide me an update on the diagram and I did not hear back. I emailed him again Monday asking for an update and to send the document and he still has not responded.

78. Thirteen minutes after Mr. Ridenour sent his email to Mr. Icenhower, Mr. Icenhower forwarded it to Mr. Troudt, who shortly thereafter thanked Mr. Icenhower via email reply.

79. On Monday November 24, 2016, Complainant sent an email to Mr. Ridenour, copying Mr. Troudt, Mr. Icenhower, and Ms. Mora, explaining that his work on DYC "had led me to inadvertently drop the ball on a few tasks." He added that he was almost back on track.

80. In an email dated November 26, 2014, Mr. Ridenour sent an email to Mr. Icenhower and Mr. Homer, stating, "Just wanted to update you guys on BJ as he has been much more engaged in the project and communicative this week. He was on our call yesterday and he followed up with an email to the call volunteering to make the updates that we needed."

81. Mr. Icenhower did not forward Mr. Ridenour's November 26, 2014 email, which was complimentary about Complainant, to Mr. Troudt.

Complainant on FTO November 19 - November 21

82. From Wednesday November 19 through Friday November 21, 2014, Complainant was out of the office on FTO.

83. Employees were asked to leave out of office messages on the voicemail and email so that individuals attempting to contact them would know they were unavailable and when they would be back in the office.

84. When Complainant was out of the office for the three days starting with November 19, 2014, he did not activate his out of office autoreply for either his voicemail or his email.

85. Upon Complainant's return to the office on Monday, November 24, 2014, the red light on Complainant's telephone was lit, indicating that he had messages.

86. Mr. Troudt noticed that the red light was still lit on Complainant's phone at noon on November 24th.

87. Mr. Troudt confronted Complainant, who explained that his password was not working and he could not access his messages.

88. Mr. Troudt called IT, got Complainant's password, and he and Andrea Mora listened to the four voicemail messages on Complainant's phone. One was from before Complainant went on FTO, two were from when he was out on FTO, and one was from the morning he was back in his office.

89. Because he was on FTO, Complainant missed the weekly DYC meeting on Friday November 21, 2014, but had not alerted the other attendees that he would be out of the office that day.

90. On November 26, 2014, Mr. Abeyta sent an email to Troudt, complaining about Complainant and Ms. Mora and their handling of DYC; more specifically, he complained about Complainant's not getting things done. Another purpose of the email was to defend himself against any perception that any issues with DYC were because of his own job performance.

Mr. Troudt Begins Contemplating and Preparing For Complainant's Employment Termination

91. On November 24, 2014, Mr. Troudt and Ms. Boyd held a meeting. The agenda for that meeting included, under Decision Items, "Need to decide on BJ Whitney's status going forward," and, as the last item on the agenda, "Concerned about the ripple effect BJ leaving will have from both a positive and work load perspective."

92. On November 26, 2014, Mr. Troudt sent a copy of Complainant's PMAP to Nyle Boyd and indicated that Andrea Mora made some modifications to it after Mr. Troudt had reviewed it and had come to an agreement with Ms. Mora about what should be included. Specifically, Mr. Troudt indicated that Ms. Mora added a statement that Complainant received excellent comments from stakeholders regarding his responsiveness to requests and these customers finding his professional demeanor invaluable. The email also alludes to proceeding with an action for which Mr. Troudt wanted "to be sure everything is in order" before proceeding, a reference to the contemplated termination of Complainant's employment.

93. On November 28, 2014, Mr. Troudt forwarded a copy of Mr. Abeyta's November 26th email to Nyle Boyd, stating, "Thought you might be interested in seeing this e-mail from Emory."

94. On December 3, 2014, Ms. Stuber emailed Mr. Ridenour and Mr. Homer, asking them if they have any feedback they wanted to share with Mr. Troudt "regarding BJ's contributions (or lack thereof) regarding the process team.... I know he's been unresponsive, but if there are other things Bob [Troudt] needs to know, please give him the details."

95. A couple of hours later, Mr. Troudt responded to Ms. Stuber's email and inquired of Mr. Ridenour and Mr. Homer, "I'm especially interested in whether BJ followed through on his e-mail to Daryn [Ridenour] that he would start attending meetings and follow through with his obligations. I understand that he may have been late for or missed another meeting. Is that correct?"

96. Mr. Ridenour promptly responded to Mr. Troudt, copying Ms. Stuber and Mr. Homer, forwarding the email he sent to Mr. Icenhower on November 26th, adding that "[s]ince this email we have not had any team meetings or deliverables that he has missed."

97. Respondent offered no evidence that Mr. Troudt asked Mr. Icenhower why he did not forward Mr. Ridenour's November 26, 2014 email to Mr. Troudt.

98. On December 5, 2014, Mr. Icenhower sent an email to Mr. Troudt forwarding the former's May 12, 2014 email to Complainant reminding him to check the Nurse I and HCT II open continuous recruitments and get them turned around within a day of receipt.

99. Mr. Icenhower did not tell Mr. Troudt, as he told Ms. Schmelzer when she talked about the May 12, 2014 email with Mr. Icenhower, that when he sent the May 12, 2014 email to Complainant, he meant it as just a friendly reminder and that at that point he had no issues with Complainant's job performance.

100. In response to Mr. Icenhower's December 5, 2014 email forwarding his May 12, 2014 email, Mr. Troudt responded by asking, "How many times did you have to remind him to do this?" Respondent provided no evidence of any response to this email inquiry.

101. On December 5, 2014, Mr. Troudt sent Ms. Boyd a draft termination letter, prepared for Ms. Boyd's signature as the appointing authority. Ms. Stuber was copied on the letter.

102. On December 8, 2014, Ms. Stuber sent an email to Mr. Troudt stating, "Only other thought or info that might want to be added... would be the interim PMAP discussions in October. If his performance, communication, etc. were addressed at that time, it would be good to add that date and info."

103. On December 8, 2014, another business partner, Candice Mahoney, alerted Mr. Troudt that she had asked Complainant on several occasions, starting in July 2014, about the results of an unemployment insurance hearing, without receiving a substantive response.

104. On December 11, 2014, Nyle Boyd, as Employment Affairs Division Director, sent a memorandum to Mr. Troudt, delegating appointing authority status to his position for a number of human resource functions and actions, including administering disciplinary actions.

105. On December 16, 2014, the management team of CDHS HR held a meeting with the following attendees: Ms. Boyd, Mr. Troudt, Ms. Stuber, Ms. Mora, and Mr. Icenhower.

106. During the meeting, the attendees discussed each subordinate employee, ostensibly as a tool to help decide how to allocate development efforts.

107. Ms. Mora did not stay for the entire meeting, but defended Complainant and referred to him as "a diamond in the rough."

108. Mr. Troudt, Mr. Icenhower and Ms. Stuber expressed their views that Complainant's job performance was wildly inconsistent.

109. The meeting participants constructed a matrix and placed each HR office employee in one of nine quadrants. Complainant was placed in lowest quadrant.

110. Sometime during this period from November 24, 2014 to December 16, 2014, Mr. Troudt made the decision to terminate Complainant's employment.

Termination Letter

111. On December 17, 2014, Mr. Troudt met with Complainant and gave him his termination letter.

112. The termination letter, originally drafted for Nyle Boyd's signature, states, in pertinent part, "Your HR manager and I have had the opportunity to assess your progress and performance and during this time. You and I had a one-on-one meeting on August 8, 2014, at which time we discussed staff expectations and I expressed that HR staff is to follow up with customers in a timely and effective manner if they ask for something. Based on my direct observations, along with information shared by staff in the unit, your overall work contributions and follow through fall below the reasonable expectations of a Human Resources Technician III, in the best interest of the Department, I have decided to terminate your employment effective December 17, 2014."

113. The termination letter enumerated "some" of the reasons for the decision, to "include recent events resulting in a culmination of my growing concern of your ability to consistently meet the expectations of the position...."

114. The termination letter referenced the following examples:

- Work contributions and follow through are inconsistent

- When co-workers address work concerns with you, you become defensive and accuse others of not doing their jobs or not having enough time to do what he is asked to do
- You cut people off when they are talking to interject your points
- Earlier in the year (May 2014), the HR Generalist [Justin Icenhower] felt the need to remind you via email to conduct a "daily check the Nurse I and HCT II open continuous recruitments and get them turned around within a day of receipt" because it was not being done despite being requested
- Repeated failures to follow up with co-workers and produce assigned work in a timely manner (referring, as an example, to Mr. Ridenour's concerns)
- Missing deadlines for rosters
- Late for NYC/HR meeting on November 14
- Out of the office for several days without activating your out of office message for phone and email
- Your part in missing a deadline for unemployment insurance documents on September 22, 2014
- Your failure to respond to another request for unemployment insurance claim information from July 2014 through November 2014

115. The termination letter concluded as follows: "To conclude, although these issues have been brought to your attention and discussed with you, you have not demonstrated the ability to take constructive feedback without becoming defensive making communicating with you uncomfortable and less effective. You have failed to consistently provide what is expected of your position, without repeatedly having to be reminded to complete a task, attend a meeting or be informed that you did not do something, thus creating delays in work processes, extra work for your coworkers, or delayed responses for our clients...."

Board Petition and Preliminary Review Process

116. Complainant filed a timely petition for hearing with the Board on December 27, 2014. After a preliminary review, ALJ Pamela Sanchez recommended that a hearing be granted, and the Board adopted ALJ Sanchez's recommendation and granted Complainant's request for a hearing.

DISCUSSION

I. CLAIMS AND BURDEN OF PROOF

Complainant was a probationary employee at the time of the termination of his employment. While probationary employees are entitled to the same rights to a hearing as a certified employee under § 24-50-125(5), C.R.S., a probationary employee does not have the right to a hearing to review any disciplinary action taken pursuant to § 24-50-125(1), C.R.S. The conduct referenced in § 24-50-125(1), C.R.S., includes failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform duties. In this case, Complainant has alleged a violation of the State Employee Protection Act, § 24-50.5-101, *et seq.*, C.R.S. ("Whistleblower Act" or "Act"), and a hearing was granted after a preliminary review to determine whether his termination was in violation of the Whistleblower Act.

As the proponent of the order in this matter, Complainant bears the initial burden of proof on his Whistleblower Act claim. § 24-4-105(7), C.R.S. *See also Ward v. Industrial Commission*, 699 P.2d 960, 968 (Colo. 1985)(holding that the burden of proof in Whistleblower Act claims follows the burden of proof in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)). If

Complainant is successful in establishing his claim, Respondent is then provided with an opportunity to prove by a preponderance of the evidence that it would have “reached the same decision even in the absence of protected conduct.” *Ward*, 699 P.2d at 968.

The Board may reverse or modify Respondent’s decision if its adverse employment action is found to be contrary to law. § 24-50-103(6), C.R.S. In this case, the only question to be decided is whether Complainant’s employment was terminated in violation of the Whistleblower Act.

II. HEARING ISSUES

A. Whistleblower Act standards

The purpose of the Whistleblower Act, set forth in the legislative declaration, is to encourage “state employees ... to disclose information on actions of state agencies that are not in the public interest.” § 24- 50.5-101, C.R.S.; *Lanes v. O’Brien*, 746 P.2d 1366, 1371 (Colo. App. 1987).

The Whistleblower Act “protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies’ actions which are not in the public interest.” *Ward*, 699 P.2d at 966. The Act prohibits the initiation or administration of “any disciplinary action against any employee on account of the employee’s disclosure of information.” § 24-50.5-103(1), C.R.S. (emphasis added).

In determining whether there has been a violation of the Whistleblower Act, “[i]t must be initially determined whether the claimant’s disclosures fell within the protection of the ‘whistleblower’ statute and that they were a substantial or motivating factor in the [action taken by the agency]. If the claimant’s evidence establishes that his expression was protected by the ‘whistleblower’ statute, then the [reviewing adjudicator] must determine whether [the agency’s] evidence established, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct.” *Ward*, 699 P.2d at 968 (adopting the procedure in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)).

B. Complainant stated a *prima facie* case of violation of the Whistleblower Act

The first question, therefore, is whether Complainant has proven by a preponderance of the evidence that his disclosures “fell within the protection of the whistle-blower statute” and that his disclosures “were a substantial or motivating factor” in the decision to terminate his employment. *Ward*, 699 P.2d at 968.

1. Complainant’s showing of protected disclosures

In order to show that his disclosures fall within the protection of the Whistleblower Act, Complainant must be able to prove that: 1) he made a disclosure of information, as that term is defined in § 24-50-102(2), C.R.S., and applicable caselaw; and 2) that Complainant has made a “good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure.” § 24-50.5- 103(2), C.R.S. Additionally, in order for Complainant’s disclosures to be protected, the disclosures must not be exempted from the Act’s protections, pursuant to § 24-50.5-103(1)(a)-(1)(c), C.R.S.

a) Did Complainant make one or more disclosures of information to any person?

(1) Defining the parameters of a “disclosure”

The Whistleblower Act defines "disclosure of information" as "the written provision of evidence to any person ... regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-102(2), C.R.S. Disclosures may be presented in writing or offered orally. *Ward*, 699 P.2d at 967. "[D]isclosures that do not concern matters in the public interest, or are not of 'public concern', do not invoke this statute." *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

First Amendment protections also depend, in part, upon the analysis as to whether statements were of "public concern." First Amendment precedent, therefore, is helpful in understanding the contours of such a requirement. See *Ward*, 699 P.2d at 968 (adopting the First Amendment allocations of burden of proof in *Mt. Healthy* as the template for a whistleblower analysis).

The Supreme Court has characterized a matter of "public concern" as one "fairly considered as relating to any matter of political, social, or other concern of the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

The statements also do not need to be made in public in order to warrant a finding that the statements were of public concern. See *Handy-Clay v. City of Memphis, TN*, 695 F.3d 531, 544 (6th Cir. 2012).

On the other hand, statements which have "the ring of internal office politics" do not present matters of public concern. *Handy-Clay*, 695 F.3d at 543. "While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996)(internal citations and quotation omitted).

Additionally, the disclosure of information may be made to "any person." § 24- 50-102(2), C.R.S.

(2) Application to Complainant's statements

In this matter, Complainant's disclosures to Andrea Mora, Nancy Schmelzer, Bob Troudt and Joel Ferguson concerned the question of whether the Human Resources department of CDHS was conducting the recruitment process in a manner consistent with applicable rules and applicable laws. On several occasions in 2014, Complainant voiced his concern that the manner in which some individuals in the southern district HR office were conducting recruitments was in violation of the law and the state personnel rules. At hearing, Respondent argued that these concerns were personal, not public concerns, because they dealt with how Complainant should do his job. However, that view of Complainant's concerns is too narrow and ignores the fact that Complainant was complaining about an agency's apparent violations of state personnel rules. An agency's violation of state law and state personnel system rules constitutes a matter of public concern.

Respondent also argued at hearing that all Complainant did was ask questions during the NEOGOV training conducted by Mr. Ferguson of the DPA on November 6, 2014, and questions are not statements and cannot be considered disclosures protected by the Whistleblower Act. However, Complainant established by a preponderance of the evidence that his questions and comments during the November 6, 2014 meeting with Mr. Ferguson disclosed Complainant's belief that some individuals in the southern district HR office were violating personnel rules and Colorado law in the manner in which they were conducting recruitments.

Therefore, Complainant established by a preponderance of the evidence that the concerns he expressed to his supervisors and to Mr. Ferguson constituted disclosures protected by the Whistleblower Act.

b) Did Complainant provide his disclosure to an appropriate person?

The Whistleblower Act requires that an employee who wishes to disclose information must "make a good faith effort to provide to his supervisor or appointing authority, or member of the general assembly the information to be disclosed prior to the time of its disclosure." C.R.S. § 24-50.5-103(2). This requirement, as well as the requirement for a disclosure of information, has been met when an employee discloses information meeting the test for a disclosure of information under the Act to his or her supervisor, and does not necessarily require two separate disclosures of information. *Gansert v. Colorado*, 348 F. Supp.2d 1215, 1226-28 (D. Colo. 2004).

It was undisputed at hearing that Complainant had complained to his team lead, Andrea Mora, his supervisor, Nancy Schmelzer, and then to Bob Trout, who became his supervisor when he was hired in July 2014, replacing Ms. Schmelzer. These disclosures, therefore, have been provided to his "supervisor or appointing authority or member of the general assembly." C.R.S. § 24-50.5-103(2). See also C.R.S. § 24-50.5-102(5)(defining "supervisor" to include "any ... department head, division head, or other person who supervises or is responsible for the work of one or more employees"). Therefore, Complainant's disclosures of information meet this requirement. See *Gansert*, 348 F. Supp.2d at 1226-28.

2. Complainant's showing that disclosures were a substantial or motivating factor in the imposition of discipline

a) Was Complainant the subject of discipline?

The Whistleblower Act prohibits the imposition of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. "Disciplinary action" is construed broadly in the Act, and includes "any direct or indirect form of discipline or penalty" including termination of employment, withholding of work, unsatisfactory or below standard performance evaluations or the "threat of any such discipline or penalty." C.R.S. § 24-50.5-102(1).

Termination of employment is explicitly listed as an example of a disciplinary action under the Whistleblower Act. Complainant has clearly met this element of the test for Whistleblower Act protection.

b) Did Complainant show that his disclosures were a substantial or motivating factor in the imposition of discipline?

Once it is established that protected disclosures occurred, the employee must demonstrate that the adverse action was taken "on account of the employee's disclosure of information." § 24-50-103(1), C.R.S. Under *Ward v. Industrial Comm.*, 699 P.2d 960 (Colo. 1985), Complainant must demonstrate that his protected disclosures were a substantial or motivating factor for the action taken against him. In other words, he must demonstrate a causal connection between his protected conduct and the adverse action. If he sustains this burden, Respondent then has an opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of Complainant's disclosures. *Ward*, 699 P.2d at 968. This allocation of the burden of proof assures that employees do not abuse the Whistleblower Act to evade appropriate consequences for poor job performance. *Taylor v. Regents of University of Colorado*, 179 P.3d 246, 249 (Colo. App. 2007).

The Colorado case law implementing the Whistleblower Act fails to define the standard by which the causal connection is established. Therefore, case law implementing the anti-retaliation provisions of the Colorado Anti-Discrimination Act ("CADA") and Title VII (they are identical) provides useful guidance. Under this long line of cases, in anti-discrimination cases involving retaliation claims, the causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996). Generally, unless the adverse action is "very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Id.* at 328 (citations omitted; emphasis in original).

In this case, the first time that Mr. Troudt became aware that Complainant disclosed information to the effect that the southern district HR office was not handling recruitments with consistency and within the state personnel system rules and best practices to someone outside CDHS was during the NEOGOV training with Joel Ferguson on November 6, 2014. Despite Mr. Troudt's testimony to the contrary, the preponderance of the evidence establishes that Mr. Troudt was not happy with Complainant's questions and comments during that meeting. At the latest, Mr. Troudt considered terminating Complainant's employment within eighteen days of Complainant's disclosures to Mr. Ferguson. The close temporal proximity between the November 8th meeting and the first documentary evidence of Mr. Troudt anticipating the termination of Complainant's employment demonstrates a causal connection justifying an inference of retaliatory motive.

Complainant has, therefore, demonstrated that his disclosures about the manner in which some recruitments were conducted by the CDHS HR office were a substantial or motivating factor in his termination.

As a result, Complainant has met his initial burden to demonstrate that there was a violation of the Whistleblower Act in this matter.

C. Respondent has proven that it would have terminated Complainant's employment even in the absence of Complainant's protected disclosures

Once Complainant has established that his disclosures were protected under the Whistleblower Act and were a substantial or motivating factor in his termination, Respondent is provided the opportunity to prove, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected activity. *Ward*, 699 P.2d at 968.

The ultimate question, therefore, is whether Respondent has proven that Complainant would have been terminated from his probationary employment even in the absence of his protected disclosures.

The evidence at hearing provided ample support for the proposition that Mr. Troudt, as Complainant's supervisor and then his appointing authority, had concerns about some aspects of Complainant's job performance prior to November 2014. Mr. Troudt became progressively more concerned about Complainant's job performance in November 2014, as he received reports alleging that Complainant was being nonresponsive to his colleagues and was not meeting deadlines.

It appears that some of those reports were misinterpreted, or were not properly investigated, or were designed to cast Complainant in a misleading negative light. Mr. Troudt's reliance on some of

these reports of Complainant's malfeasance was likely misplaced.² Complainant displayed many of the signs of becoming a valuable addition to the CDHS HR team, and a forward-thinking, productive, very dedicated and productive state employee. Had Complainant been a certified state employee, and had he appealed his termination on the grounds that it was arbitrary, capricious, or contrary to rule or law, his appeal would likely have been successful. However, given his probationary status, and that the only claim he has asserted is retaliation in violation of the Whistleblower Act, even a misguided decision to terminate his employment may not be overturned if, as in this case, the decision to terminate was not motivated by retaliation for his whistleblowing activity.

It is clear that Complainant did have some performance issues, and it was on these issues that Mr. Troudt primarily relied in making his decision. Complainant was too ambitious, took on too many projects and tasks, and was reluctant to relinquish them. He did not effectively communicate that he was spread too thin, and that he could not reasonably meet all his deadlines and obligations without significant assistance, especially in October and November 2014 when he was inundated with DYC-related tasks. He did not communicate to stakeholders when he was unable to meet deadlines or attend meetings, leading some to believe that he was unreliable and just did not care. He did not let others know when he was out of the office so that they could make other arrangements. He did not effectively navigate the politics of the southern district's HR office. These shortcomings led Mr. Troudt to conclude that Complainant was not reliable, was not responsive enough. Some of these issues had been brought to Complainant's attention as early as March 2014 in Ms. Schmelzer's PMAP. They were noted again in Complainant's interim evaluation in October 2014. The many complaints Mr. Troudt received in November 2014 convinced him, rightly or wrongly, that Complainant was unlikely to change.

Complainant's questions and comments during the NEOGOV training with Mr. Ferguson on November 6, 2014, and Mr. Troudt's negative reaction to them, may have been a factor in the decision to terminate Complainant's employment. However, the avalanche of complaints against Complainant that Mr. Troudt received in November and early December 2014 played a far greater role in the ultimate decision to terminate.

When all of these matters are taken into account, it is clear that Respondent has successfully proven that Mr. Troudt's decision would have been the same even in the absence of Complainant's protected disclosures of information.

CONCLUSION OF LAW

1. Respondent's termination of Complainant's probationary employment was not a violation of the State Employee Protection Act.

ORDER

The termination of Complainant's employment is **affirmed**. This matter will be referred to the State Personnel Director for further review.

² When Complainant received Mr. Icenhower's May 12, 2014 email, he thought he was being set up. Based on Mr. Icenhower's subsequent conduct – his forwarding the May 12th email to Mr. Troudt without mitigating commentary, his forwarding Mr. Ridenour's derogatory email about Complainant to Mr. Troudt but not forwarding Mr. Ridenour's subsequent complimentary email about Complainant, his pointing the finger at Complainant for the failure to provide information about an unemployment insurance claim hearing – Complainant may have been more perceptive than he imagined.

Dated this 22nd day
of August, 2016
at Denver, Colorado.



Keith A. Shandalow
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of August, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Bernard J. Whitney, Jr.



Davin Dahl
Employment/Personnel & Civil Rights Unit
Civil Litigation & Employment Law Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
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Dana Shea-Reid

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rules 8-62 and 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-66, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.